(27)

87-2048

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

TEXACO INC.,

Petitioner,

-v.-

RICKY HASBROUCK, d/b/a

RICK'S TEXACO, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF SERVICE STATION DEALERS OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF AMICUS CURIAE IN SUPPORT OF THE POSITION OF RESPONDANT

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September 6, 1989

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MOTION OF SERVICE STATION DEALERS OF AMERICA FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF

Pursuant to Rule 36 of the rules of this Court Service Station Dealers of America move This Court for Leave to File an Amicus Curiae Brief. Leave to File was obtained from Counsel for Respondant, however Leave to File was sought from Counsel for Petitioner but was not granted.

INTEREST OF AMICUS

The SSDA is uniquely postured in this case. It is the voice of America's sixty thousand independent retail service station dealers. It consists of forty-three state and regional dealer associations. The interest of SSDA in this case is twofold.

On the one hand, the plaintiffs in this case are former service station dealers who were forced from their business as a result of the price discrimination. Many of SSDA's members are similarily situated retailers in that they are directly supplied by a major oil company yet must compete with similar operations that are supplied by or even operated by wholesaler/distributors known in the trade as "jobbers".

At the same time, thousands of SSDA's members are supplied by jobbers. These dealers could face competitive harm if the allegations of the wiping out of functional discounts were true. SSDA believes that the Robinson-Patman Act specifically authorizes <u>legitimate</u> functional discounts and herein proposes a

standard by which such discounts can be judged.

On the other hand, we cannot live with a rule such as that advocated by Petitioner, which would in effect immunize a petroleum refiner from liability under Section 2(a) of The Act.

SSDA believes that the twin perspectives it brings are not represented in the case.

The SSDA, as a national organization, must be cognizant of the interests of all of its members, including both the direct buying retailer who are the disfavored purchasers in this case as well as the distributor supplied dealer who were the favored purchasers in this case.

The SSDA also wishes to bring to The Court's attention key legislative history as well as the existence of

other important statutes and marketplace conditions affecting the petroleum industry. Accordingly, Leave to File the enclosed brief is sought.

Respectfully submitted,

D. G. Daskalopoulos

Dimitri G. Daskalopoulos

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INTEREST OF THE AMICUS

The Service Station Dealers of America is a trade association headquartered in Washington, D.C. It is a federation of 43 state and regional gasoline retailer associations that serve as the voice of America's 60,000 independent gasoline dealers.

The issues presented are of vital importance to SSDA members.

Many SSDA members are directly supplied by refiners, who also supply wholesaler distributors known as jobbers. Thousands of SSDA members are supplied by jobbers, putting SSDA in a unique position in this case.

On the one hand, the Petitioner argues for a rule that would <u>per se</u> immunize refiners from liability under

Section 2(a) of the Robinson-Patman Act, irrespective of the competitive consequences.

On the other hand, a rule that unduly limits legitimate functional discounts would harm the SSDA members served by distributors.

Nevertheless, SSDA believes the judgment below should be affirmed.

SUMMARY OF ARGUMENT

1. Amicus believes that the facts of the case do not comport with the issue briefed by petitioner, accordingly, the writ of certiori should be dismissed.
2. The language, legislative, and purposes of the Act clearly reject the contention of Petitioner that a manufacturer can never be liable under Section 2(a) for granting a

"uniform" functional discount irrespective of competitive harm.

3. The basis for a legitimate "functional discount" exemption to Robinson-Patman liability must be found in the statute itself. The only basis is the cost justification defense, therefore any functional discount must bear a reasonable relationship to costs the grantor would not have to bear.
4. Respondants proof of damages fully complied with the competitive injury requirements of Section 2(a) and the "Robinson-Patman" injury requirements of Section 4 of the Clayton Act.

ARGUMENT

I. THE FACTS OF THE CASE DO NOT PRESENT THE ISSUES RAISED BY PETITIONER

Amicus agrees with Respondant that the facts of the case do not present the issues briefed by Petitioner, and that the writ of certiorari should be dismissed.

The case does not present a garden variety "functional discount", equally available to all wholesalers.

In effect, the Court is being asked for an advisory opinion on issues that simply do not fit the facts of the case.

Amicus adopts the arguments of Respondant herein by reference and urges the Court to dismiss the writ.

II. A DISCRIMINATION IN PRICE BETWEEN WHOLESALERS AND DIRECT BUYING RETAILERS MAY GIVE RISE TO A SECTION 2(a) VIOLATION

A. The Plain Language of the Statute

The statute plainly indicates that a manufacturer can be found liable under Section 2(a) where a functional discount causes competitive harm, thus Petitioner's claim of per se immunity must be rejected.

Petitioner would have this Court submit to a tyranny of labels, whereby it could insulate itself from a 2(a) claim simply by declaring that the favored purchaser is a wholesaler, irrespective of whether or not the "wholesaler" actually performed the functions of a wholesaler.

In a 2(a) case, the critical inquiry is whether the price discrimination may affect competition; not the functional level of the purchasers.

To begin with, the plain language of the statute states, in pertinent part:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchases of commodities in like grade and quality . . . where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent

competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."

It is unequivocally clear from the language that the focus is on the "effect of such discrimination."

Moreover, it is also clear that phrase "may be to substantially lessen competition or tend to create a monopoly in any line of commerce" means exactly what it says.

This language was part of the original Section 2 of the Clayton Act of 1914.

It contains no functional limitations; it simply requires a showing that as a result of the challenged price discrimination, there may be a substantial lessening of

competition in any significant market.

In effect, Petitioner's argument is the same argument rejected by this Court in George Van Camp & Sons Co. v. American Can. Co. 278 U.S. 245 (1929).

In that case, The Court rejected an interpretation of the "in any line of commerce" language that would have confined it to the particular line of commerce in which the discriminator is engaged, stating:

> "The phrase is comprehensive, and means that if the forbidden effect or tendency is produced in one out of all the various lines of commerce, the words 'in any line of commerce' literally are satisfied." 278 US at 253.

The language is clear -- a price discrimination causing the requisite competitive injury is unlawful

regardless of the functional level in the favored purchaser's chain of distribution at which the competitive harm is first felt.

Finally, the plain language of the statute is also clear that where the effect of the price discrimination is to injure, prevent or destroy competition with either the grantor or recipient of a discrimination in price or with the customers of the grantor or recipient, liability may attach. See, e.g., Falls City Industries, Inc. v. Vanco Beverage Inc. 460 US 428 (1983).

Thus as stated by this Court in FTC v. Fred Meyer Inc. 390 US 341, 356-57 (1968):

"When Congress wished to expand the meaning of competition to include more than resellers

operating on the same functional level, it knew how to do so in unmistakable terms. It did so in Section 2(a) of the Robinson-Patman Act."

The central inquiry is the effect of the price discrimination.

That a "functional discount" may have the requisite effect is also clear.

As one commentator explained:

". . . Though the functional classes receiving the discounts might operate at different distributive levels, as do wholesalers and retailers, the customers of one class might be in competition with the members of the other, as retailers who buy from wholesalers are in competition with retailers who buy

directly from the manufacturer; and the relative size of the functional discounts might be such as to affect the relative opportunity of those customers. . . Regardless of the purposes that may underlie the discount structure . . . A discrimination is unlawful if all or a part of a disfavored class of customers may be injured.

C. Edwards, The Price Discrimination Law, 287 (1959).

Petitioner's argument is contrary to the plain language of the Act.

B. The Legislative History

This Court has repeatedly made clear that it will not "judicially legislate", that is to adopt through judicial interpretation a reading of a

particular statute specifically rejected by Congress. J. Treutt Payne v. Chrysler Motors Corp. 451 US 273, 276 (1981).

It is important to note that the per se exemption advocated by Petitioner was contained in both the House and Senate versions in what became the Robinson-Patman Act in the 74th Congress (HR 8442, 74th Cong. 1st Session. June 11, 1935; S.3154 74th Cong., 1st Sess., June 26, 1935).

The language was deleted by Congress, and consistent with J. Treutt Payne, this Court should not judicially legislate it.

Simply put, the legislative history shows that Congress did not intend to give wholesalers and their customers unjustified benefits from price discriminations that disfavored

direct buying retailers. See, generally, J. Palamountain, The Politics of Distribution, 228-30 (1955).

Petitioner's arguments are also undercut by the subsequent failure of Congress to enact "functional discount" amendments despite repeated efforts to do so.

Thus, Petitioner's reading of the statute conflicts with both the plain language and the legislative history of the Act.

C. The Purposes of the Act

"The history of the Act is both interesting and colorful, and seems clearly to indicate that the Act was drafted and enacted in a concerted effort to retain the small retailer and its supplier on

the American commercial landscape." Calvani, Functional Discounts Under the Robinson-Patman Act. 17 Boston College Industrial & Commercial Law Review 543 at 548 n. 22 (1976)

Indeed, the preservation of small business has been expressly recognized by the Court as the primary concern of the Act. See, e.g., FTC v. Morton Salt Co. 334 U.S. 37, 49. (1948), Cf. Business Electronics v. Sharp Electronics ____US at ____ (1988) (per se illegality of vertical restraints would create incentive for vertical integration by manufacturers, hardly conducive to fostering creation and maintenance of small business).

In this case, the "mom and pop" retail dealers were harmed by Texaco's discriminatory pricing.

If the Court were to adopt Petitioner's contentions, then any "functional discount" irrespective of size, irrespective of any justification and irrespective of any competitive harm that may occur would not be actionable under Section 2(a). The results would be catastrophic for the very "mom and pop" retailers Congress sought to protect in enacting the Robinson-Patman Act.

A prime example is the conduct of the Petitioner in the retail gasoline market. According to Congressional testimony by the Petroleum Marketer's Association of America (supporting Petitioner as an Amicus in this case) Texaco specifically told their members to "ax dealers to profit and company-operated your stations, as we, Texaco, are doing." Hearings on H.R.

5023; Petroleum Marketing Practices Act Amendments, Before the Committee on Energy and Commerce, 98th Cong., 2nd Sess., May 22 and June 21, 1984, Serial No. 98-159 at p. 73.

By giving sizable, unjustified discounts to wholesalers, a refiner such as Texaco makes it impossible for small retailers such as Hasbrouck to stay in business. The net result would be that, as happened here, the dealers would give up the stations, and the company would then integrate forward by operating the stations themselves.

In other Congressional testimony it was revealed that Petitioner as well as other refiners in 1986 had instituted "functional discounts" between direct buying retailers and wholesalers ranging from 13 to 27

cents per gallon, harming direct supplied dealers. Hearing on H.R. 3824, To Amend The Clayton Act, Before the Committee on Small Business, 99th Cong. 2nd Sess., April 17, 1986 at pp. 78-123.

While it has been argued by some Amici in this case that such action is "economically irrational," we respectfully submit that that analysis is superficial and misleading.

A manufacturer may, like Texaco, want to increase its profits by forward integration, or may simply desire to have greater control over its retail network.

Even if one accepts, arguendo, Petitioner's statement of the case, that it involves only a uniform wholesaler discount equally available to all purchasers, clearly, the

manifest purposes of The Act require rejection of the contention that a manufacturer is per se immune from liability under Section 2(a).

Amicus would also point out that the policies of other Congressional enactments would also be affected.

For example, The Petroleum Marketing Practices Act, 15 USC 2801-2841 specifically prohibits termination of a dealer or jobber franchise or non-renewal of a franchise relationship unless the franchisor can affirmatively prove that grounds within the Act exist.

Through discriminatory pricing of the type encountered herein, a franchisor can sell to a dealer at a price which would not enable even the most efficient dealer in the world to survive. The net result is that the

dealer would be economically evicted from the station, as Hasbrouck and others were, in direct contradiction of PMPA's prohibition of termination and non-renewal.

Simply put, the fostering and maintenance of small business, which is the primary goal of the Robinson-Patman Act would be severely damaged by adoption of Petitioner's rule.

Small retailers could be wiped out by customers of favored wholesalers who receive discounts that would be unbounded in scope, and unrelated to any cost justification.

This result is completely at odds with the purposes of the statute, and should not be countenanced by this Court.

III. FUNCTIONAL DISCOUNTS MUST BE COST JUSTIFIED

Amicus believes that any functional discount must bear a reasonable relationship to the costs that the giver of the discount would otherwise bear.

As we have seen, Congress expressly did not include functional discount language in the statute.

Significantly, even the committee report on the versions of the bill that contained the "functional discount" defense stated that a cost basis was an essential component of such discounts.

Legitimate functional discounts must have a basis in the statute.

The only basis in the statute is the Section 2(a) cost justification provision.

Amicus strongly disagrees with the notion advanced that sellers would have to closely monitor the costs of their wholesalers.

First of all, the seller must have a reasonable idea of the costs of the functions performed by wholesalers, otherwise they could not make a rationale decision as to whether to use wholesalers, or to engage in distribution themselves.

This is particularly true in the petroleum industry where major oil companies frequently act as distributors.

The key inquiry in functional discount cases has always been whether the discounts are reasonably related to the cost savings to the supplier. See, e.g., Mueller Co. 60 F.T.C. 120 (1962) aff'd 323 F2d. 44 (7th Cir.

1963), cert. denied 377 US 923.

The ability of the wholesaler to perform a function less expensively than the manufacturer, combined with the right of the manufacturer to grant a discount based on its costs both rewards and promotes efficiency. The wholesaler profits from efficiency, not a subsidy. Allowing an arbitrary functional discount does not promote efficiency.

A second requirement is that "wholesaler" actually perform the function it is being compensated for.

To hold otherwise would exhalt form over substance, and allow nominal wholesalers to receive discounts based solely on the labels attached to them by their suppliers.

It is significant to note that the Petroleum Marketing Practices Act

protects jobber-distributors from termination of their franchises. And legislative history is clear that one who actually performs the functions of a jobber is included within the Act's definition of "distributor" 15 USC 2801 (6), See, 123 Cong. Record p. H16358 (remarks of Rep. Dingell) June 6, 1978.

Thus, we believe that the appropriate standard for legitimate functional discounts is that they must be reasonably related to the cost savings to the supplier, and must compensate the wholesaler for services actually performed.

IV. THE NINTH CIRCUIT CORRECTLY FOUND THAT THE REQUISITE COMPETITIVE AND "ROBINSON-PATMAN" INJURIES WERE PROVED BY RESPONDANTS

A. Section 2 (a)

The 9th Circuit first discussed

the requirements of Section 2(a), noting that 2(a) requires a plaintiff to show only, "a reasonable possibility that a price differential may harm competition." 842 F.2d at 1041.

Petitioner and various Amici assert reversible error in the application of the Morton Salt inference of harm to competition from evidence of harm to competitors, in the Ninth Circuit's analysis of Section 2(a). Their primary contention is that because the Respondants operated at different functional levels than the favored buyer, the inference should not apply.

As made clear by this Court in Falls City, Industries Inc. v. Vanco Beverages 460 U.S. 428 at 434-35, the fact that the favored and disfavored

buyers are not in direct competition does not render Morton Salt inapplicable.

Moreover, even a cursory reading of the opinion below shows that the Morton Salt inference was not the basis for finding that Section 2(a)'s competitive injury requirement was satisfied. The Court specifically noted that Hasbrouck and the other plaintiffs produced "considerable specific evidence supporting the conclusion that Texaco's pricing policies adversly affected competition." 842 F.2d at 1041.

To the extent the jury and the 9th Circuit relied on the inference it was jutified, and in any event, Petitioner lost on the factual issue of causation.

B. Antitrust Injury Under Section 4

As the 9th Circuit correctly noted, section 2(a) is satisfied where there is proof that competitive injury may result, and injuctive relief may issue; however, recovery of damages requires a showing of actual injury and causation.

Contrary to the arguments of some Amici, the Morton Salt inference played no role in the 9th Circuit's analysis.

The question presented here is the application of the teachings of J. Truett Payne v. Chrysler Motors Corp. 451 US 557 (1981) to the facts of this case, and the application of the concept of "antitrust injury."

It is critical to realize that application of the term "antitrust

injury" is a misnomer in this case.

This Court has already held that the Robinson-Patman Act is not an antitrust law as the term is used in Section 4 of the Clayton Act. Nashville Milk Co. v. Carnation Co. 355 U.S. 373, 375-36 (1968). It has been consistently recognized that The Act, "Consistent with its origins was drafted not as an antitrust law . . . and was designed to protect classes of business." U.S. Dept. of Justice Report on The Robinson-Patman Act at p. 210 (1975).

Simply put, in J. Truett Payne the Court interpreted the injury requirement of section 4 (a) in a comprehensive sense to require that (1) the injury was in fact caused by the violation and (2) that the injury was of the kind the Robinson-Patman

Act was designed to prevent and flows from the violation.

Thus, J. Truett Payne stands for the proposition that a Robinson-Patman plaintiff must show injury to him or her self as a result of a price discrimination, precisely what the Fifth Circuit did on remand. See, Chrysler Credit Corp. v. J. Truett Payne Co. 670 F.2d 575, 580 (cert. denied. 459 U.S. 908 (1982) See, generlly, Areeda and Hovenkamp, Antitrust 1988 Supplement Section 340.5, (noting that a broader interpretation would go far beyond the issue presented and the language of the opinion.)

The Robinson-Patman Act was specifically concerned with intrabrand as well as interbrand competition and had as its prime goal the fostering

and maintenance of small business.

As the 9th Circuit noted there was substantial direct evidence of "Robinson-Patman" injury, including substantial evidence of lost sales and profits, testimony of former customers of the disfavored retailers, and Petitioner's knowledge of deleterious effects, 842 F.2d at 1043, 44, thus satisfying the injury requirement.

CONCLUSION

The verdict below should be affirmed.

Respectfully submitted,

Dimitri G. Daskalopoulos

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Counsel of Record

CERTIFICATE OF SERVICE

I, Dimitri G. Daskalopoulos, a member of the Bar of this Court, hereby certify that on thei 6th day of September 1989, three copies of the Motion for Leave to File a Brief Amicus Curiae in the above titled case were mailed, first class postage prepaid, to counsel for petitioners, and to counsel for respondents, as listed below. I futher certify that all parties required to be served have been served.

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